APPENDIX A

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
No. 2001-612

HENRY TORROMEO

v.

TOWN OF FREMONT

MDR CORPORATION

v.

TOWN OF FREMONT

Argued: July 11, 2002
Opinion Issued: December 13, 2002

Sumner F. Kalman, Attorney at Law, P.C., of Plaistow (Sumner F. Kalman on the brief and orally), for the plaintiffs.

Casassa and Ryan, of Hampton (John J. Ryan on the brief and orally), for the defendant.

Susan Slack, of Concord, by brief, for the New Hampshire Municipal Association, as amicus curiae.

NADEAU, J. The defendant, the Town of Fremont (town), appeals orders of the Superior Court (McHugh and Abramson, JJ.), holding the town liable to the plaintiffs, Henry Torromeo and MDR Corporation (MDR), for damages caused by the town's

denial of building permits pursuant to an invalid growth control ordinance. We reverse.

The trial court found, or the record discloses, the following facts. Torromeo is the developer of Mason's Corner, a twenty-seven lot residential subdivision in Fremont. The subdivision plan was approved by the town planning board and recorded in the Rockingham County Registry of Deeds in February 1997. In August 1999,when five lots in the subdivision remained unsold, the town stopped issuing building permits pursuant to its growth control ordinance. Torromeo and a prospective purchaser sued the town, seeking to require it to issue a building permit to the buyer. The Trial Court (Galway, J.) determined that the subdivision was exempt from the growth control ordinance under RSA 674:39, which provides, in part, that an approved and properly-recorded plat or site plan is exempt from subsequent zoning ordinance changes, except those expressly protecting public health standards, for four years from the date of recording. See RSA 674:39 (1996). The court enjoined the town from refusing to issue the requested permit.

MDR is the developer of Glidden Hill Estates, a fourteen lot subdivision in Fremont. MDR was issued five building permits, but was informed by the town that under the growth control ordinance, no more permits would be issued until April 2000. MDR sued the town, challenging the growth control ordinance. MDR argued that the ordinance was invalid because the town never legally adopted a capital improvement program (CIP), which is a prerequisite to the adoption of a growth control ordinance, see RSA 674:22 (1996). The Trial Court (Murphy, J.) agreed, ruling, among other things, that because the subject of the motion made at the 1987 town meeting regarding a CIP was not stated in the warrant, the motion was invalid. The court therefore ruled that a valid CIP was never adopted and that the growth control ordinance was invalid ab

initio. We summarily affirmed that decision on June 26, 2000. See MDR Corporation v. Town of Fremont, No. 2000-100 (N.H. June 26, 2000).

Following the dispositions of their respective cases in superior court, the plaintiffs filed separate actions against the town for damages caused by the temporary taking of their property from the time building permits were denied under the growth control ordinance until they were finally issued. Each plaintiff filed a motion for summary judgment on the issue of liability, arguing, among other things, that the town's liability was established by the prior decision in the MDR case that the growth control ordinance was invalid ab initio. The town objected, arguing that the plaintiffs had to show that the ordinance was unconstitutional, not merely invalid or unenforceable. The Trial Court (McHugh, J.) denied the motions.

MDR then filed a request for a ruling of law that the decision declaring the ordinance invalid ab initio also rendered it "unconstitutional per se," making it unnecessary to further prove that the ordinance was arbitrary or unreasonable. The trial court ruled:

> As this Court understands the dispute, the determination of whether or not the Growth Control Ordinance is or is not unconstitutional is not a prerequisite to the plaintiff claiming monetary damages, but those damages would be limited to economic losses due to its inability to build homes for the period of time that the Town refused to grant building permits.

The court ruled that MDR would have to prove unconstitutionality, however, in order to recover attorney's fees.

The town filed a motion for reconsideration, which the court addressed in an order dated March 19, 2001. In that order, the court joined the MDR and Torromeo cases by consent of the parties. It then sought to clarify its prior rulings on the takings issue, noting in hindsight that it should have granted the plaintiffs' motions for summary judgment on the issue of liability. It concluded:

> Call it what you will, this Court finds and rules that the plaintiff [sic] in both of these cases are entitled as a matter of law to recover damages for economic loss due to the Town's attempted enforcement of its invalid Growth Control Ordinance. In this Court's view those economic losses are compensable whether or not a "taking" occurred under existing case law.

A trial was held on the issue of damages and the Trial Court (Abramson, J.) awarded the plaintiffs the carrying costs and fair rental value on their unsold lots during the time the growth control ordinance prevented them from obtaining building permits. The town now appeals, contending that the trial court erred in ruling: (1) that the plaintiffs did not have to prove the unconstitutionality of the growth control ordinance in order to recover for a taking; and (2) that the plaintiffs could recover damages for loss of economic use of their property based solely upon the finding in the previous MDR case that the ordinance was invalid due to a procedural error.

"We will uphold the decision of the trial court unless it is unsupported by the evidence or is legally erroneous." Smith v. Town of Wolfeboro, 136 N.H. 337, 342 (1992). The town argues that the trial court erred in failing to distinguish between an ordinance that is unconstitutional and one that is merely

unenforceable due to a procedural defect in its enactment. We agree.

The ruling in the first MDR case, which the plaintiffs claim establishes liability for damages, did not find the growth control ordinance unconstitutional, but rather void due to a procedural defect. The trial court stated as much in its order on MDR's request for ruling of law: "Declaring that the Ordinance cannot be applied to the plaintiff because it was not procedurally enacted correctly does not mean the Ordinance is substantively unconstitutional." In ruling that the plaintiffs could nevertheless recover damages, however, the trial court erred.

We have held that "arbitrary or unreasonable [zoning ordinance] restrictions which substantially deprive the owner of the economically viable use of his land in order to benefit the public in some way constitute a taking, within the meaning of our New Hampshire Constitution requiring the payment of just compensation." Burrows v. City of Keene, 121 N.H. 590, 598 (1981) (quotation omitted). We have, however, rejected claims for damages in zoning ordinance challenges in which it was determined that no taking or inverse condemnation occurred, *see* Soares v. Town of Atkinson, 129 N.H. 313, 317 (1987), or where the constitutionality of the regulation was not challenged, *see* Smith, 136 N.H. at 345. We have also distinguished an erroneous planning board decision based upon an otherwise valid regulation from "the application of an invalid regulation," and held that the former does not constitute a compensable taking even though it may subject the property owner to a loss of value. Id. at 346; see also Dumont v. Town of Wolfeboro, 137 N.H. 1, 10 (1993). Rather, the owner's only remedy is reversal of the erroneous decision on appeal. See Smith, 136 N.H. at 346; Dumont, 137 N.H. at 10.

The plaintiffs argue that because the growth control ordinance was found to be invalid ab initio, this is a case of "the application of an invalid regulation" as discussed in Smith. We disagree. The context in which that term is used in Smith indicates that by "invalid regulation," we meant an unconstitutional one:

> . An erroneous planning board decision based on sound authority must be distinguished from the application of an invalid regulation. An appeal of a mistaken board decision is an element of the governmental decision making process under RSA 677:15 (amended 1991). A declaration that an ordinance is unconstitutional is an extraordinary measure, designed to rectify a conclusory act of rule making that stripped a property owner of his or her rights.

Smith, 136 N.H. at 346.

Absent a determination that the ordinance is unconstitutional and constitutes a taking, this case presents merely the type of municipal error for which judicial reversal of the erroneous action is the only remedy. "Judicial, quasi-judicial, legislative or quasi-legislative acts of a town ordinarily do not subject it to claims for damages." Marino v. Goss, 120 N.H. 511, 514 (1980). Accordingly, we hold that the plaintiffs are not entitled to damages, and that their only remedy is issuance of the erroneously-denied building permits.

Reversed.

BROCK, C.J., and DALIANIS and DUGGAN, JJ., concurred.

APPENDIX B

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Henry Torromeo
v.
Town of Fremont

00-C-0256

MDR Corporation

v.
Town of Fremont

00-C-0257

ORDER

In these consolidated cases, plaintiffs seek monetary damages for lost development and real estate profit suffered after the Town of Fremont imposed and maintained an invalid interim growth control ordinance in March 1999.

In December 2000, the Court (Murphy, J.) ruled that the Town's original growth control ordinance was invalid ab initio for failing to comply with the statutory requirements of RSA 674:22. See MDR Corp. v. Town of Fremont, Rockingham Co. Super. Ct. No. 99-E-644. Notwithstanding this Court order, the Town continued to implement its ordinance and refused to issue building permits to both plaintiffs in these cases, which would have allowed them to build residential homes on pre-approved subdivision lots for prospective buyers. These lawsuits followed.

On March 19, 2001, the Court (McHugh, J.) granted plaintiffs' Motions for Summary Judgment on Liability, finding that plaintiffs were entitled to recover damages for their economic loss as a matter of law because defendants continued to impose their invalid ordinance preventing development. The Court ruled that the economic losses were compensable whether or not a "taking" occurred under existing case law and scheduled an evidentiary hearing on the issue of plaintiffs' economic damages. From the testimony and exhibits presented at the evidentiary hearing, the Court finds and rules as follows:

Plaintiffs are developers of two residential subdivisions in the Town of Fremont. Henry Torromeo and his company, Torromeo Industries (collectively "Torromeo"), developed the Mason's Corner Subdivision, which consists of 27 lots for single family homes. The Fremont Planning Board approved this subdivision for development. Torromeo then filed the approved plan in the Rockingham County Registry of Deeds in February 1997. Torromeo bought this subdivision and acquired its development rights in August 1998.

In January 1999, Torromeo bonded the subdivision project with the Town and began selling lots to builders. The builders then found buyers for the lots, obtained building permits, and began building on each lot in January 1999. By March 1999, when the Town imposed the permanent growth control ordinance, Torromeo had sold 11 out of 27 subdivision lots, to three different builders. However, the Town revoked previously issued building permits on at least two of these lots for the builders' failure to complete substantial construction. This revocation of permits and new substantial construction policy for retention of building permits, caused builders to be wary of purchasing lots in the subdivision. The asserted reasoning for this decline was that builders would not buy lots that they could not develop according to their own timelines, or,

develop at all. Sales continued to gradually decline, and by August 1999 five lots remained unsold. By August 26, 1999, the Town refused to issue further building permits, because its growth control ordinance prohibited their issuance and its maximum capacity for permits had been reached. With no permits available, Torromeo was unable to sell any of the five remaining lots until February 2000, when building permits again were issued.

Torromeo now seeks damages consisting of the fair rental value of his lots from March 1999, when the invalid ordinance took effect, through February 2000, when his remaining lots sold. He additionally seeks carrying costs for each of the five lots, which consist of property taxes, fees to extend letters of credit, insurance costs, accounting costs, and opportunity costs.

Torromeo's project manager and cousin, Vincent Iacozzi, also seeks damages in this action. He asserts that Torromeo promised to sell him Lot #9 in the subdivision, at an extremely discounted rate, and that this lot would be available in May 1999. In reliance, Mr. Iacozzi applied for a building permit for Lot #9 and placed his own home on the market, expecting that the building permit would be issued. Subsequently Mr. Iacozzi's home sold, but the Town denied his building permit. This caused Mr. Iacozzi to incur alleged damages for storing his possessions and renting a home from December 1999 until August 2000, when his home in Mason's Corner was finally completed.

The evidence shows that Mr. Iacozzi did not take title to Lot #9 until June 2001, and that he knew of the problems with the growth control ordinance throughout his tenure as project manager for Torromeo Industries. Moreover, the evidence shows that Mr. Iacozzi did not purchase the lot for fair market value, and, he has never intervened as a party in this case.

Finally, Mr. Iacozzi has not alleged any actions by the Town that prevented him from purchasing a lot for fair market value and obtaining a building permit elsewhere. Accordingly, the Court rules that Mr. Iacozzi's alleged damages are too speculative and too tenuously connected to this case to be determined by the Court.

MDR Corporation, in contrast, was developing a subdivision in Fremont designated as Glidden Hill Estates. The subdivision plan for Glidden Hill Estates consisted of 14 lots for single family homes. The Fremont Planning Board approved this subdivision plan in May 1999. MDR subsequently recorded the plan in the Rockingham County Registry of Deeds in August 1999. After planning board approval but prior to recordation, MDR obtained bonding of the project with the Town, built and paved roads within the subdivision, and began marketing the lots for sale to builders. MDR then applied for, and was granted, five building permits. However, the Town then informed MDR that no further permits would be issued until April 2000 due to the growth control ordinance.

The growth control ordinance ultimately prevented MDR from selling the remaining nine lots in its subdivision for almost one year. Again, the bar to selling the lots was that builders would not buy land on which they could not build. MDR subsequently brought suit in this Court to enjoin the Town from enforcing this ordinance and to declare the ordinance unconstitutional. This suit led to the above-referenced ruling, that the ordinance was invalid ab initio, for failure to comply with statutory requirements for its imposition. MDR Corp. v. Town of Fremont,, Rockingham Co. Super. Ct. No. 99-E-644 (Murphy, J.) (decided December 2000). MDR ultimately received building permits and sold its nine remaining lots by sometime in June 2000. MDR now seeks the fair rental value of

its nine lots from August 1999 through June 2000, as well as the same carrying costs itemized by Torromeo above.

The Court finds and rules that both Torromeo and MDR are entitled to recover damages beginning on August 26, 1999, the date that building permits were no longer available under the invalid growth control ordinance. Contrary to plaintiffs' position, the Court finds that the existence of an invalid growth control ordinance itself does not cause damage. Damage occurs only when the growth control ordinance actually prohibits plaintiffs from receiving building permits. Here, the undisputed testimony shows the damage began on August 26, 1999. Because the building permits were no longer available as of this date, the properties were unmarketable to builders and plaintiffs then suffered damage. See Prudhomme v. Flanagan, 138 N.H. 561, 575 (1994) (finding that damage occurs only when plaintiff can take no further action to improve its own position). Accordingly, the Court rules that Torromeo is entitled to the carrying costs and fair rental value for his five lots from August, 26, 1999 through February 2000 (six months) and MDR is entitled to the same damages for its nine lots from August 26, 1999 through June 2000 (ten months).

MDR and Torromeo retained Joseph G. Fremeau, MAI, and Fremeau Appraisal, Inc., to provide the Court with an expert assessment of their damages. Mr. Fremeau presented the Court with an expert appraisal of plaintiffs' properties, calculating a fair rental value for each lot involved and itemizing all relevant carrying costs. The Town, in turn, retained John M. Crafts, MAI, and Crafts Appraisal Associates, Ltd., to provide the Court with an alternative analysis of plaintiffs' damages.

Mr. Crafts reviewed the Fremeau report and used substantially the same methodology as Mr. Fremeau in arriving at his own appraisal. The only differences in the two appraisal reports are the appropriate market rental rate of return for single

family homes and the appropriate time period for which rental value should be calculated. The Court finds that Mr. Crafts agrees with Mr. Fremeau, by not presenting contrary data, on both the market values for the MDR properties and the carrying costs of each plaintiffs' properties. The Court previously ruled above on the appropriate time period for damages sustained by each plaintiff, finding that the rental period would begin for each plaintiff on August 26, 1999. Accordingly, the only remaining issue in dispute is the appropriate rental value of the properties.

Both experts agreed that the proper method of valuation for the undeveloped subdivision lots was the income capitalization approach based upon the lots' fair market rental value. See In re City of Nashua, 138 N.H. 261, 265 (1998). They arrived at this determination due to the temporary nature of plaintiffs' damages. The experts further agreed that single family building lots are not typically rented on the open market. Thus, comparable rentals were unavailable for comparison in their damage analysis. Accordingly, the experts agreed that the appropriate market rental value must be calculated by applying the appropriate rate of return to the actual fair market value of the property.

The parties agree that the fair market value of MDR's nine Glidden Hills Estates subdivision lots was $660,000. Accordingly, the Court will not disturb this valuation. However, Mr. Fremeau found the value of Torromeo's five Mason's Corner subdivision lots to be $250,000, while Mr. Crafts found their value to be $230,000. Mr. Crafts' estimation of fair market value is derived from the actual sales prices of the five Mason's Corner lots in February 2000. In contrast, Mr. Fremeau's estimation of their fair market value came from comparable sales of similar lots at $50,000 per lot. The Court finds that Mr. Crafts' appraisal is based upon actual market data and that Mr. Fremeau's opinion that one lot sold at less than fair market value is not supported by raw data. Because the expert

appraisal values are close in number, the Court presumes that the sale price of the fifth lot is a reasonable estimation of its fair market value, and it is documented with raw data. Accordingly, the Court adopts Mr. Crafts' $230,000 fair market value estimate for the Mason's Corner lots.

However, the Court adopts Mr. Fremeau's 12% market rate of return, to be applied to these values in determining appropriate market rent. Mr. Fremeau clearly and credibly explained his calculation of this percentage, which was substantiated upon real data in the commercial market. Mr. Fremeau looked to the average rate of return for retail and restaurant sites in the surrounding area, and found that the average rate of return for commercial property hovered somewhere around 10%. Specifically, he compared fast food establishments to gas stations in the surrounding area. Mr. Fremeau then looked to the rate of return on low-risk CD's and Treasury Bills, and learned that this rate hovered around 7%. He further determined that home and commercial mortgage rates in the Fremont area hovered around 9.5%; higher risk stocks received a rate of return greater than 12%; and the Standard and Poor's (S&P) Index had increased more than 12% between mid 1999 and mid 2000. Based upon these averages, and the booming New Hampshire real estate market, Mr. Fremeau determined that a residential lot would receive a slightly higher rate of return, due to its slightly higher market risk on the rental market than would commercial property. Thus, he added two percent to the average commercial rate of return, which also was consistent with the 12% increase in the S&P annual index.

In contrast, Mr. Crafts found that a 7.5% rate of return was more appropriate for the subdivision lots at issue. Mr. Crafts looked to the Town of Fremont bond rating, the commercial lending rate for the Town of Fremont, and additional tax exempt issues within the Town. Mr. Crafts then multiplied these numbers by a 30% tax factor and arrived at an

after-tax rate of approximately 5%. Recognizing that the undeveloped lots under an approved subdivision plan would require some sort of management and upkeep, Mr. Crafts then added 2.5% to the 5% rate to arrive at his final rate of return.

The Court finds Mr. Fremeau's analysis of rates of return to be much more clear, credible, concise, and substantiated upon, real data in the commercial real estate market. Further, Mr. Fremeau's analysis comports with a reasonable person's estimation in a real estate transaction during a booming real estate market. The Court finds that Mr. Crafts' analysis is not premised upon any form of comparable rates of returns and is far too speculative to be adopted. Accordingly, the Court adopts Mr. Fremeau's application of 12% as the appropriate rate of return to apply to the fair market values of the fourteen lots.

Applying this rate of return to the fair market value, the experts testified that the resulting number must be divided by twelve to arrive at a monthly rental rate. Then, this monthly rate is multiplied by the number of months that each plaintiff is entitled to receive a fair rental value. Under this analysis and the rulings enumerated above, the following charts summarize the expert appraisals and the Court's award consistent with the above findings and rulings:

	MDR PROPS. Rental Value	TORROMEO PRPS Rental Value	MDR Costs	TORROMEO Costs
FREMEAU	$660,000*.12	$250,000*.12	$5,600	$10,000
APPRAISAL	=$79,200/12m $6,600*10mo =$66,000 FRV	=$30,000/12m =$2,500*6mo =$15,000 FRV		
CRAFTS	$660,000*.075	$230,000*.075	$5,600	$10,000
APPRAISAL	=$49,500/12m =$4,125*10mo =$41,250 FRV	=$17,250/12m =$1,438*6mo =$8,628 FRV		
COURT	$660,000*.12	$230,000*.12	**$5,600**	**$10,000**
ORDER	=$79,200/12m =$6,600*10m **=$66,000 FRV**	=$27,600/12m =$2,300*6mo **=$13,800 FRV**	UNDIS-PUTED	UNDIS PUTED

For the reasons stated, and based upon the above calculations, the Town is ORDERED to pay Mr. Torromeo $23,800.00 as the appropriate fair rental value and carrying costs for his five unbuildable lots. The Town is further ORDERED to pay MDR Corporation $71,600.00 as its appropriate fair rental value and carrying costs for its nine unbuildable lots. These damages are appropriate based upon the Town's continued imposition of its invalid growth ordinance, which prevented plaintiffs from selling or developing their remaining lots.

Each party has submitted requests for findings of fact and rulings of law. In light of the narrative discussion above, the Court rules upon plaintiff's requests for findings of fact and rulings of law on the Mason's Corner Subdivision as follows:

GRANTED: 1-14; 19-22;

DENIED: 15-18; 24-25 (see decision);

NEITHER GRANTED NOR DENIED: 23 (see decision).

The Court rules upon plaintiff's requests for findings of fact and rulings of law on the Glidden Hill Subdivision as follows:

GRANTED,: 1-13; 17-20;

DENIED 14-16;

NEITHER GRANTED NOR DENIED: 21-22 (see decision).

The Court rules on the Town's requests for findings of fact and rulings of law as follows:

GRANTED: 3-7; 10; 12-13; 21; 26-27; 30;

DENIED: 1-2 (see Order March 19, 2001 (McHugh, J.)); 8; 9 (see decision); 17-20; 28-29; 31-34 (see decision); 17-20; 28-29; 31-34;

NEITHER GRANTED NOR DENIED: 14-16 (see decision); 22-25 (see decision and Order (Murphy, J.) in 99-E-644).

The Court rules on the Town's requests for relief as follows:

GRANTED: B;

DENIED C-G;

NEITHER GRANTED NOR DENIED: A. (The Court will not reverse the prior ruling of law relating to liability in this case. Judge McHugh revisited this issue three times and thoroughly explained his ruling. This ruling is the law governing this case which the Town may appeal at the

conclusion of this litigation) (See Order (McHugh, J.) (dated March 19, 2001)).
So ORDERED.

DATE: September 26, 2001

/s/ Gillian Abramson
GILLIAN L. ABRAMSON
Presiding Justice

APPENDIX C

THE STATE OF NEW HAMPSHIRE
ROCKINGHAM, SS. SUPERIOR COURT

00-C-257
MDR Corporation

V.

Town of Fremont

00-C-256
Henry Torromeo

V.

Town of Fremont

ORDER

The purpose of the within Order is to clarify the issues in these related cases. Although these two cases have never been formally joined, the Court now does so by consent of the parties. Counsel now agree that because the issues raised in these two lawsuits are identical and because the lawyers are the same as well as the witnesses, these cases should be tried together.

Both of these lawsuits were brought as a direct result of a ruling made in case number 99-E-444, MDR Corporation v. Town of Fremont. In that case the Court (Murphy J.) found and ruled that the defendant's Growth Control Ordinance enacted in March of 1987 was invalid ab initio for failing to comply with the statutory requirements of RSA 674:22. Thus because of a procedural defect in the enactment of the Ordinance, it had no validity. Notwithstanding that fact, the Town implemented the

Ordinance and refused both plaintiffs in these cases building permits to enable them to construct residential homes for their perspective buyers.

Both plaintiffs have brought lawsuits seeking monetary compensation for the lost profits that they have suffered as a result of the defendant's implementation of its invalid Growth Control Ordinance. Shortly after the lawsuits were brought, both plaintiffs filed Motions for Summary Judgment on the issue of liability. They argued that because Judge Murphy's determination that the Growth Control Ordinance was invalid, said determination having been affirmed on appeal to our Supreme Court, there were no disputed issues regarding liability. In the defendant's objection to both Motions for Summary Judgment, it took the position that merely because the Growth Control Ordinance was defective procedurally did not mean that it was substantively unconstitutional. The defendant argued that unless a finding was made that the ordinance was substantively unconstitutional then the plaintiffs were not entitled to any monetary damages.

Upon receipt of this Court's Order denying the Motion for Summary Judgment, the plaintiff in 00-C-257 filed a Request for Ruling of Law. In that pleading the plaintiff suggested that the fundamental question to be addressed is not whether the ordinance was substantively unconstitutional, but rather whether the defendants refusal to issue building permits based upon the procedurally invalid Growth Control Ordinance constituted a "taking" of the plaintiff's property as that term is defined under case law. The plaintiff suggested that under case law such a taking did occur for which it was entitled to monetary damages.

By Order dated January 17, 2001, this Court in part agreed with the plaintiff's position. It ruled that "the

determination of whether or not the Growth Control Ordinance is or is not unconstitutional is not a prerequisite to the plaintiff claiming monetary damages but those damages would be limited to economic losses due to its inability to build homes in the period of time that the Town refused to grant building permits". However the Court in effect imposed a higher standard on the plaintiff if it sought to recover other damages in addition to economic loss such as attorney fees.

Upon receipt of the Court's January 17, 2001 Order, the defendant filed a Motion for Reconsideration. In the motion the defendant argued that the substance of the Court's October 5, 2000 denial of the plaintiff's Motion for Summary Judgment on liability and its Order of January 17, 2001, could not be reconciled. While the Court does not agree with the defendant's interpretation of its two prior Orders, it does agree that some clarification is necessary.

The parties have a dispute as to whether or not a legal "taking" has occurred with respect to the defendant's implementation of it [sic] what has been determined to be its invalid Growth Control Ordinance back in 1987. The plaintiff argues that under case law a "taking" did occur; the defendant argues that under the same case law no "taking" resulted.

In the Court's mind, the issue transcends what constitutes a legal "taking". The defendant concedes that for a period of time it refused to allow either of these plaintiffs to obtain building permits based upon what has later been found to be an invalid implementation of its Growth Control Ordinance. Call it what you will, this Court finds and rules that the plaintiff in both of these cases are entitled as a matter of law to recover damages for economic loss due to the Town's attempted enforcement of its invalid Growth Control Ordinance. In this Court's view those economic losses are compensable whether or

not a "taking" occurred under existing case law. It is unconscionable for a municipality to take the position that no damages should be paid when its ordinance restricting building has been determined to be invalid and when the implementation of that Ordinance resulted in provable monetary losses to the plaintiffs.

In retrospect the Court determines that the plaintiffs' Motions for Summary Judgment on liability should have been granted when they were initially filed. Under the within ruling the plaintiffs shall be permitted to place evidence before the Court on their respective claims for economic loss without addressing at all the issue of liability. The plaintiffs do not allege that the defendant is guilty of bad faith in the implementation of its Growth Control Ordinance, however bad faith does not have to be proven if the damages sought are limited to economic loss.

Because of the potential for confusion as a result of this Court's past Orders it determines that the defendant's objection to its findings of liability as a matter of law is timely made and shall be ripe for appeal at the conclusion of the damage phase of this litigation.

Both of these cases have been scheduled for a bench trial with 00-C-257 scheduled on March 28, 2001 and 00-C-256 scheduled on May 1, 2001. Both of those scheduled trials are continued because counsel agree that the cases can be heard together. This Court stands ready to try these cases in either May or June. The Court will be presiding in Belknap County for the month of July and August thus counsel are requested to review their respective calendars for the month of May and June and select a date certain for the one-day trial of these cases and notify the Court within the next ten days.

So ORDERED.

DATE: March 19, 2001

/s/ Kenneth McHugh
Kenneth R. McHugh
Presiding Justice

APPENDIX D

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT
00-C-0257

MDR Corporation

V.

Town of Fremont

ORDER ON PLAINTIFF'S REQUEST
FOR RULING OF LAW

The trial of this case is scheduled for February 2, 2001. It is the plaintiff's position that based upon the order of Judge Murphy in another case involving these same two parties that it does not have to prove liability in order to be able to obtain damages. The plaintiff requests that this Court review Judge Murphy's order and definitively rule prior to trial that in essence the issue of liability is closed.

The plaintiff argues that Judge Murphy's ruling that the Growth Control Ordinance which was enacted by the defendant and found to be invalid ab initio entitles it to damages without any evidence being produced as to the specifics of the Ordinance. It is the position of the defendant that the mere fact that the Ordinance was found to have been improperly enacted does not mean that the Ordinance was found to be unconstitutional. The defendant argues that unless a finding of unconstitutionality is made with respect to the ordinance, the plaintiff is entitled to no damages or the payment of attorney fees. All the plaintiff is entitled to receive as a result of Judge

Murphy's Order is exactly what it did receive, namely the issuance of all of the building permits that it had requested.

As this Court understands the dispute, the determination of whether or not the Growth Control Ordinance is or is not unconstitutional is not a prerequisite to the plaintiff claiming monetary damages, but those damages would be limited to economic losses due to its inability to build homes for the period of time that the Town refused to grant building permits. Because the Court believes the plaintiff can claim these damages under Judge Murphy's existing Order, it finds that the plaintiff does not have to prove the Ordinance is unconstitutional. However Judge Murphy's Order in and of itself would not entitle the plaintiff to claim attorney fees. For that claim, unconstitutionality would have to be proved. Declaring that the Ordinance cannot be applied to the plaintiff because it was not procedurally enacted correctly does not mean the Ordinance is substantively unconstitutional.

In summary, if the plaintiff is willing to reduce its damage claims to that of its losses because of the delay in obtaining building permits, then unconstitutionality of the Growth Control Ordinance need not be proved. However if the plaintiff is seeking attorney fees in addition to its monetary losses occasioned by the delay in building then the plaintiff will have to prove unconstitutionality.

It is hoped that the within Order has clarified the procedural posture of this case. However if either party believes that the issue should be further discussed prior to trial either party may request a hearing and one will be granted within the next ten days.

So ORDERED.

DATE: January 17, 2001

/s/ Kenneth McHugh
Kenneth R. McHugh
Presiding Justice

APPENDIX E

THE STATE OF NEW HAMPSHIRE
Rockingham Superior Court
PO Box 1258
Kingston, NH 03848 1258
603 642-5256

NOTICE OF DECISION

SUMNER F KALMAN
P 0 BOX 988
147 MAIN STREET
PLAISTOW NH 03865-0988

00-C-0257 MDR Corp. vs. Town of Fremont

Please be advised that on 10/03/2000 Judge McHugh made the following order relative to:

Motion for Summary Judgment ; Denied
Re: Issue of Liability "For all of the reasons set forth in the defendant's objection, the within motion is denied."

Raymond Taylor
Clerk of Court

10/03/2000
cc: John J Ryan

APPENDIX F

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 2000-100, MDR Corporation v. Town of Fremont, the court upon June 26, 2000, made the following order:

The court having reviewed the notice of appeal and appendix, the decision below is summarily affirmed in accordance with Rule 25(1)(b) on the basis that the trial court has issued an opinion identifying and discussing the issues presented, and the court does not disagree with the opinion. Plaintiff's motion for summary affirmance or, in the alternative, for dismissal or declination is, therefore, moot.

Brock, C.J., and Horton and Broderick, JJ., did not participate; Groff, Mangones, and Mohl, JJ., superior court justices, participated by special assignment under RSA 490:3.

Distribution:

Clerk, Rockingham County Superior Court 99-E-0444
Sumner Kalman, Esquire
John J. Ryan, Esquire
Honorable Walter L. Murphy
Donna K. Nadeau, Supreme Court
File

Howard J. Zibel
Clerk

APPENDIX G

STATE OF NEW HAMPSHIRE
ROCKINGHAM, SS. SUPERIOR COURT

MDR Corporation

v.

Town of Fremont
99-E-444

ORDER

Before the Court is the Plaintiff's Amended Petition for Declaratory Judgment and Injunctive Relief challenging the validity of the Town of Fremont's ("the Town") Growth Control Ordinance and its decision to deny certain building permits to the plaintiff based on that ordinance. MDR brought this action on August 27, 1999 and filed an amendment to the Petition on October 21, 1999. This Court denied MDR's request for temporary injunctive relief on September 23, 1999. The Court conducted a final hearing on the merits on December 6, 1999.

For purposes of this Order, the Court finds the following facts. At the Town Meeting on March 11, 1987, after the forty-three (43) Articles set forth in the warrant were voted on, an oral motion was made, seconded, and passed:

> To see if the Town will vote to authorize the Selectmen to appoint a committee to prepare and submit recommendations to the Planning Board for a Capital Improvement Program; said committee to be composed of eight members, including representatives from the Planning Board, School Board, Police Department, Fire Department, Selectmen, Conservation

> Commission, Parks and Recreation Commission and from the general public.

MDR's Amendment to Petition at ¶ 7, 8. At the first session of the March 1999 Town Meeting, the Town passed a Growth Management and Innovative Land Use Control as part of the Town Zoning Ordinance, replacing an Interim Growth Management Ordinance passed in 1998. Pursuant to the growth management ordinance passed at the March 1999 Town Meeting, on April 14, 1999, the Town Planning Board imposed "Growth Control and Permit Limitations." These limitations provide that, for the period between April 14, 1999 and April 13, 2000, three (3) permits would be issued to lot owners "who do not have vested rights" and twenty-six (26) permits would be issued to all other lot owners.

The plaintiff, MDR Corporation ("MDR") owns a parcel of land in Fremont, New Hampshire known as Glidden Hill Estates, subject to a fourteen lot subdivision plan approved by the Town Planning Board on May 5, 1999 and registered with the Rockingham County Registry of Deeds on August 14, 1999. After the Ordinance had taken effect, MDR applied for six (6) building permits to construct single family homes on the property. The Town granted five (5) permits and told MDR that no further permits would be available until April 2000 at the earliest, citing the Town's 1999 Growth Management Ordinance in support of its decision to deny additional permits.

MDR challenges the legality of the Town's Growth Management and Innovative Land Use Control Ordinance ("the Ordinance"), asserting that the Town has failed to create a valid capital improvement program ("CIP"), as required by RSA 674:22, which states, in relevant part:

> The local legislative body may further exercise the powers granted under this subdivision to regulate and control the timing of development. Any ordinance imposing such a control may be adopted only after preparation and adoption by the planning board of a master plan and a capital improvement program and shall be based upon a growth management process intended to assess and balance community development needs and consider regional development needs.

RSA 674:22 (emphasis added). The Town's "local legislative body" is the Town Meeting. See RSA 672:8, V. When properly authorized by a majority vote of the Town Meeting, a planning board may "prepare and amend a recommended program of municipal capital improvement projects..." RSA 674:5. "The subject matter of all business to be acted upon at the town meeting shall be distinctly stated in the warrant, and nothing done at any meeting, ... shall be valid unless the subject thereof is so stated." RSA 39:2.

Since the motion to appoint a committee to make recommendations concerning a CIP was not among the forty-three (43) published Articles on the 1987 warrant (see *supra* at 1, 2), the motion was, therefore, invalid. Even if the motion had complied with the notice requirements of RSA 39:2, it did not authorize the creation of a CIP, but rather, purported to authorize the Selectmen to create a committee to make recommendations concerning the substance of a future CIP. Since the motion was not valid, and the Town has not set forth any other evidence that the CIP is otherwise valid, the Town has never adopted a valid or enforceable CIP.

The Growth Control Ordinance, therefore, is invalid *ab initio* for failing to comply with the statutory requirements of

RSA 674:22. Accordingly, MDR's request for Injunctive Relief is, GRANTED. The Town is hereby enjoined from refusing to issue building permits to MDR on the basis of the Growth Control Ordinance. MDR's request for attorney's fees is DENIED.

MDR has submitted requests for findings of fact and rulings of law; however, the Court's findings and rulings are embodied in its narrative discussion above. MDR's requests are **GRANTED** to the extent that they are consistent with this order; otherwise, they are **DENIED.** See Geiss v. Bourassa, 140 N.H. 629, 632-33 (1996).

So Ordered.

Date: December 27, 1999

/s/ Walter Murphy
Walter L. Murphy
PRESIDING JUSTICE

APPENDIX H

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Torromeo Industries, Inc.& Vincent Iacozzi

v.

Town of Fremont

99-E-536

ORDER

Before the Court is the Plaintiffs' Petition for Declaratory Judgment Pursuant to RSA 491:22; Bill in Equity; Petition for Permanent Injunction; and Writ of Mandamus. This case arises out of the Town of Fremont's ("the Town") decision to deny plaintiff Vincent Iacozzi's request for a building permit. The Court conducted a final hearing on January 27, 2000.

For purposes of this Order, the Court finds the following facts. Plaintiff Torromeo Industries, Inc. ("Torromeo") owns a parcel of land located in Fremont, New Hampshire known as Mason's Corner. The land is subject to a subdivision plan that was approved by the Town Planning Board and registered with the Rockingham County Registry of Deeds on February 6, 1997. In March 1998, the Town enacted a one-year-long Interim Growth Management Ordinance that restricted the number of building permits to be awarded during that period. Since the enactment of the Interim Ordinance, the Town has awarded building permits for twenty-two (22) of the twenty-seven (27) lots that comprise Mason's Corner.

In a letter dated March 18, 1999, the Town Board of Selectmen informed the plaintiffs that "it is our decision at this time that the Mason's Corner Subdivision project off of North Road in Fremont is exempt from the Interim Growth Management Ordinance under RSA 674:39." Plaintiffs' Exhibit 2. At the first session of the March 1999 Town Meeting, the Town passed a Growth Management and Land Use Control Ordinance that imposed permanent restrictions on the number of building permits to be issued in any given year.

On April 14, 1999, pursuant to the growth management ordinance passed at the March 1999 Town meeting, the Town Planning Board enacted "Growth Control and Permit Limitations." These limitations provided that, for the period between April 14, 1999 and April 13, 2000, three (3) permits would be issued to lot owners "who do not have vested rights" and twenty-six (26) permits would be issued to all other lot owners. See Defendant's Exhibit B. In addition, the Planning Board granted an unlimited number of building permits during the period from April 14, 1999 until June 15, 1999 to any lot owners with "vested" rights, provided that the permits must be acted on within thirty (30) days of issuance. Id.

Plaintiff Iacozzi sold his house in Londonderry, New Hampshire on August 25, 1999, with the intention of purchasing Lot 9 in the Mason's Corner subdivision and building a new house there. To that end, Iacozzi applied for a building permit on September 23, 1999. Citing the Town's Growth Control and Permit Limitations, the Town denied his request thirty days later, stating that all of the available permits for vested lots had already been issued. The plaintiffs now appeal the Town's decision, seeking an injunction to bar the Town from denying the building permit, or alternatively, a writ of mandamus to compel the Town to grant the permit.

The plaintiffs assert that the Town's application of the Growth Control and Permit Limitations against them violates RSA 674:39, which provides in relevant part, that:

> [e]very plat or site plan approved by the planning board and properly recorded in the registry of deeds shall be exempt from all subsequent changes in subdivision regulations, site plan review regulations, and zoning ordinances adopted by any city, town, or county ... for a period of 4 years after the date of recording ... .

RSA 674:39. Only "those regulations and ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements" may be applied to subdivisions during the four-year exemption period. Id. The Town does not deny that the growth control limits are zoning ordinances and does not argue that the limits "expressly protect public health standards." See Beck v. Town of Raymond, 118 N.H. 793, 797 (1978) (Supreme Court rejected town's "public health" argument where "slow-growth" zoning ordinance conflicted with RSA 674:39 predecessor statute). The Town, instead, claims that RSA 674:22 and 674:23, which permit towns to exercise growth management, supersede the four-year exemption. The Town believes that the growth control statutes and the four-year exemption statute are in conflict with each other, and that the growth control statutes must take precedence or become void, since a significant portion of the Town's growth comes from the development of subdivisions.

The Court first notes that RSA 674:23 pertains to interim growth regulations only, and as such, has no application to the present dispute, since the plaintiffs applied for and were denied a building permit under the permanent ordinance provision, after the expiration of the Town's interim growth management ordinance. The relevant language of RSA 674:22 provides that

towns "may further exercise the powers granted under this subdivision to regulate and control the timing of development" and only after the town prepares and adopts a master plan, a capital improvement program, and a growth management process to "assess and balance" the development needs of the community and the region. Given these restrictions on the manner in which a town might control growth, clearly RSA 674:22 does not accord unlimited power to the town to manage growth.

"When interpreting two statutes which deal with a similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." Brosseau v. Green Acres Mobile Homes, 135 N.H. 643; 646 (1992) (quotation omitted); see Sprague Energy Corp. v. Town of Newington, 142 N.H. 804, 806 (1998); 73 Am.Jur.2d, Statutes, § 254 ("Where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions"). The Court notes that RSA 674:39 has been amended by the legislature three (3) times (1989, 1991, and 1995) since RSA 674:22 took effect. In the 1991 amendment, (N.H. Laws 1991, 331:4), the legislature announced that the purpose of the amendment was "to confirm and re-emphasize the intent of the general court at the time of the enactment" of RSA 674:39 in favor of protecting new subdivisions from zoning ordinances. See Blue Mountain Forest Ass'n v. Town of Croydon, 119 N.H. 202, 205 (1979) (amendment clarifying former statute is strong evidence of legislature's original intent).

Within the language of RSA 674:39, the legislature specifically excepted from the four-year exemption any

regulations "which expressly protect public health standards, such as water quality and sewage treatment requirements," proving that they were capable of creating exceptions to the four-year limit where they deemed appropriate. Because the legislature has amended RSA 674:39 since the adoption of RSA 674:22, and RSA 674:39 contains a list of specific exceptions to its applicability, the familiar axiom of statutory construction applies, *expressio unius est exclusio alterius:* "normally the expression of one thing in a statute implies the exclusion of another." St. Joseph Hosp. of Nashua v. Rizzo, 141 N.H. 9, 11-12 (1996); see also Silva v. Botsch, 120 N.H. 600, 602 (1980) ("Unless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive").

The Court finds and rules that the statutes do not contradict each other, but rather that RSA 674:22 applies to growth management generally, but not to those subdivisions protected by the four-year exemption period of RSA 674:39. The Town's concern over the unfettered development of subdivisions might be addressed by controlling the number and type of subdivisions approved under the power granted by RSA 674:35, rather than by approving a subdivision and then placing zoning restrictions on it later, during the four-year exemption period, in clear violation of RSA 674:39.

The Town further claims that it satisfied RSA 674:39 by issuing an unlimited number of permits between April 14, 1999 and June 13, 1999 in order "to reasonably accommodate any common law or statutory vested rights that any developer of a pre-existing subdivision might have." Def.'s Answer at 4. At oral argument, the Town made an offer of proof concerning school overcrowding in the Town and the measures enacted to accommodate vested property owners. Under the clear language of RSA 674:39, however, it is not unreasonable zoning restrictions that are prohibited, but rather all zoning restrictions,

other than those expressly excepted, for a period of four years. For purposes of this action, the plaintiffs do not challenge and the Court need not address, the reasonableness of the Town's actions, because the application of RSA 674:39 is clear and dispositive.

To be entitled to an injunction, the plaintiffs bear the burden of proving that there "is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law." Unifirst Corp. v. City of Nashua, 130 N.H. 11, 14 (1987) quoting Murphy v. McQuade Realty, Inc., 122 N.H. 314, 316 (1982). In addition, the court will balance the hardships to both parties. N.H. Donuts, Inc. v. Skipitaris, 129 N.H. 774, 781 (1987). "The granting of an injunction ... is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." Varney v. Fletcher, 106 N.H. 464, 467-68 (1965).

Accordingly, the plaintiffs' request for Permanent Injunctive Relief is GRANTED. The Town is hereby enjoined from refusing to issue a building permit to plaintiff Iacozzi on the basis of the Growth Control Ordinance. The plaintiffs' request for attorney's fees is DENIED. The plaintiffs have submitted requests for findings of fact and rulings of law; however, the Court's findings and rulings are embodied in its narrative discussion above. The plaintiffs' requests are GRANTED to the extent that they are consistent with this order; DENIED to the extent that they are inconsistent with this order; and NEITHER GRANTED NOR DENIED to the extent that they are irrelevant to the determination of this issue. See Geiss v. Bourassa, 140 N.H. 629, 632-33 (1996).

So **Ordered.**

DATE: January 31, 2000

/s/ Richard Galway
Richard E. Galway
PRESIDING JUSTICE

APPENDIX I

New Hampshire Constitution

First Part, Article 12

Protection and Taxation Reciprocal.--- Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.

APPENDIX J

New Hampshire Code Annotated

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39:2

Warrant. --

The warrant for any town meeting shall be under the hands of the selectmen, and shall prescribe the place, day and hour of the meeting, and, if there is an election at said meeting, in which an official printed ballot containing more than one name is used, the warrant therefor shall prescribe the time the polls are to open and also an hour before which the polls may not close....The subject matter of all business to be acted upon at the town meeting shall be distinctly stated in the warrant, and nothing done at any meeting, except the election of any town officer required by law to be made at such meeting, shall be valid unless the subject thereof is so stated....

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New Hampshire Code Annotated

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§674:5

Authorization. --- In a municipality where the planning board has adopted a master plan, the local legislative body may authorize the planning board to prepare and amend a recommended program of municipal capital improvement projects projected over a period of at least 6 years. As an alternative, the legislative body may authorize the governing body of a municipality to appoint a capital improvement program committee, which shall include at least one member of the planning board and may include but not be limited to other members of the planning board, the budget committee, or the town or city governing body, to prepare and amend a recommended program of municipal capital improvement projects projected over a period of at least years. The capital improvements program may encompass major projects being currently undertaken or future projects to be undertaken with federal, state, county and other public funds. The sole purpose and effect of the capital improvements program shall be to aid the mayor or selectmen and the budget committee in their consideration of the annual budget.

New Hampshire Code Annotated

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§674:22

Growth Management; Timing of Development.- The local legislative body may further exercise the powers granted under this subdivision to regulate and control the timing of development. Any ordinance imposing such a control may be adopted only after preparation and adoption by the planning board of a master plan and a capital improvement program and shall be based upon a growth management process intended to assess and balance community development needs and consider regional development needs.

New Hampshire Code Annotated

----------◆----------

§674:39

Four-Year Exemption. --- Every plat or site plan approved by the planning board and properly recorded in the registry of deeds shall be exempt from all subsequent changes in subdivision regulations, site plan review regulations, and zoning ordinances adopted by any city, town, or county in which there are located unincorporated towns or unorganized places, except those regulations and ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements, for a period of 4 years after the date of recording; provided, however, that once substantial completion of the improvements as shown on the plat have occurred in compliance with the approved plat, or the terms of said approval or unless otherwise stipulated by the planning board, the rights of the owner or the owner's successor in interest shall vest and no subsequent changes in subdivision regulations or zoning ordinances shall operate to affect such improvements; and further provided that:

I. Active and substantial development or building has begun on the site by the owner or the owner's successor in interest in accordance with the approved plat within 12 months after the date of approval, or in accordance with the terms of the approval, and, if a bond or other security to cover the costs of roads, drains, or sewers is required in connection with such approval, such bond or other security is posted with the city, town, or county in which there are located unincorporated

towns or unorganized places, at the time of commencement of such development;

II. Development remains in full compliance with the public health regulations and ordinances specified in this section; and

III. At the time of approval and recording, the plat or site plan conforms to the subdivision regulations, site plan review regulations, and zoning ordinances then in effect at the site of such plat.

IV. As part of its approval of a plat or plan, the planning board may, with due regard to the scope and details of a particular project, specify the threshold level of work which shall constitute "active and substantial development or building" for purposes of fulfilling paragraph I of this section, or may, for good cause extend the 12-month period set forth in paragraph I.

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APPENDIX K

Town of Fremont "Growth Management and Innovative Land Use Control" Ordinance

* * *

I. AUTHORITY

This section is enacted in accordance with both RSA 674:21 and 674:22.

II. PURPOSES

The purposes of this section of the Zoning Ordinance are as follows:

A. Promote the development of an economically sound and environmentally stable community which considers and balances regional development needs.

B. Determine monitor, evaluate and establish a rate of residential growth in the Town that does not unreasonably interfere with the Town's capacity for planned, orderly, and reasonable expansion of its services to accommodate such growth.

C. Provide a temporary mechanism to allow for phased development of residential projects to manage the impact on municipal services.

D. Provide a temporary mechanism when municipal services are strained or overloaded to reduce the rate of residential growth to allow the Town time to correct any deficiencies that have developed.

E. Protect the health, safety, convenience, and general welfare of the Town's residents.

III. FINDINGS

The Town hereby finds that:

A. The rate of population growth in the Town of Fremont has been among the fastest of any town in the immediate area, in Rockingham County, and in the State of New Hampshire.

B. According to the US Census, Fremont is estimated to have grown by 93.2 percent between 1980 and 1990, and at an annual average rate of 6.81 percent whereas the six abutting communities of Brentwood, Chester, Danville, Epping, Raymond and Sandown have grown by an average annual rate of 4.68 percent, the County at 2.6 percent and the State of New Hampshire averaged 1.88 percent per year during the same period.

C. The number of dwelling building permits (both single family and multifamily) has averaged thirty-three dwelling unit permits per year between 1993 and 1997.

D. Ellis School's current enrollment in 1998 at four hundred thirty is at full capacity.

IV. INDICATORS OF GROWTH IMPACT

The Town hereby determines that the presence of the following conditions constitutes an indicator of growth impact. An indicator of growth impact occurs when:

A. The average annual percent increase in building permits for dwelling units in Fremont for the past five

years exceeds the same average of the combined six abutting communities by 5 percent.

B. The average annual percent population growth in the Town of Fremont in the past five years as reported by the Office of State Planning exceeds the same average of combined six abutting communities by 5 percent.

C. The number of students enrolled or projected for the coming year for any public school in the Fremont School District exceeds 90 percent of its stated capacity as defined by the Fremont School Board.

D. Growth in the annual full value tax rate of Fremont in the last five years as reported by the New Hampshire Department of Revenue Administration exceeds the average rate of the combined six abutting communities of Rockingham County for the same period by 5 percent.

E. The number of dwelling units of all projects combined, for which approval is being sought from the Board, at any time of reporting, if approved, could result in the conditions defined by A, B, C, or D above.

F. The number of students enrolled or projected for the coming year for any public school in the Fremont School System exceeds 100 percent of its stated capacity as defined by the Fremont School Board.

G. The annual capital expenditures including debt service and capital outlay for combined municipal and school department expenditures exceeds 20 percent of the total municipal and school department expenditures

combined.

H. Subsections (A), (8), and (C) are all triggered in the same year.

V. PLANNING BOARD MONITORING

It is the responsibility of the Planning Board to monitor growth in the Town and to report an the following:

A. Annual Dwelling Unit Count: The Planning Board will, by May 15 or other reasonable time of each year, report on the total number of dwelling units existing at the end of its previous calendar year. Existing units mean all those units previously constructed and occupied plus those units constructed and for which Certificates of occupancy were issued in the reporting year.

B. Semi-Annual Reporting: The Planning Board, by May 15 and November 15, or other reasonable times, may report on the number of building permits and Certificates of Occupancy issued for the previous six months for all dwelling units. In the same report the Planning Board shall report on the status, as appropriate, of any phasing requirements of permit limitations in force in the reporting period.

C. Notice of Growth Impact: The Planning Board may, at any time, issue a Notice of Growth Impact, if it has determined that any of the conditions in Article IV exist. Said Notice would include a statement of whether those conditions could result in either VI (Phasing) or VII (Permit Limitations).

D. Periodic Reporting: The Planning Board may, at any time it thinks it is appropriate or necessary, issue

written reports of the status of growth activity in the town, covering such topics as the number of dwelling units or lots being proposed for approval, or for which building permits are being sought, the condition and capacity of any municipal or school facility, the tax burden existing or anticipated on the Town's residents and/or any other topic affecting or related to the growth or finances of the Town.

Pursuant to the monitoring in A-D above, the Planning Board shall make appropriate findings of fact, recommendations for action or take actions provided for in this Section of the Zoning Ordinance as a result of its monitoring and reporting responsibilities.

* * *

VII. LIMITING THE ISSUANCE OF PERMITS

If the Planning Board finds through its monitoring that either A, B, C, D, or E, plus one or more of the indicators F, G, or H has occurred, then the Planning Board may, at its discretion, issue a Notice of Growth Impact in conformance with Article V C to the Board of Selectmen, the Building Inspector, and the general public by posting a notice in the Town Hall and one other Public Place.

A. Interim Permit Limitations. Once a Notice of Growth Impact is issued, then no residential building permits shall be approved by the Building Inspector until after the hearing in Article VIII is held and until after the Planning Board has set the number of permits delineated in Article VIII. The Planning Board shall set the number of permits within fortyfive days of the Notice of Growth Impact being issued.

VIII. PROCEDURES FOR PHASING AND PERMIT LIMITATIONS

Once a Notice of Growth Impact pursuant to Article V C has been issued, then the following procedures will be observed:

A. Planning Board Finding. The Planning Board will issue appropriate findings of fact to accompany any Notice of Growth Impact issued pursuant to Article V C.

B. Public Hearing. Prior to invoking Article VI (Phasing) or Article VII (Permit Limitations), the Planning Board shall hold a public hearing with ten days notice to seek input from the general public.

C. Determination of Action. After a public hearing in Article VIII B, the Planning Board shall deliberate and decide whether (a) phasing should be invoked, (b) permit limitations should be imposed or (c) other appropriate action [sic], and issue its decisions. Any decision will be issued within forty-five days of the Notice of Growth Impact.

D. Permit Limitations. The following provisions shall apply:

(1) The Planning Board, as part of its decision, may specify what limitations are necessary in the issuance of permits for residential units up until and during any corrective action is taken by the Town and/or School District. In determining the number of permits to be issued, the Planning Board shall consider the severity of the municipal service burden, the amount of capacity remaining

in the service, and the amount of time needed to correct the service problem. After determining those facts, the Planning Board shall set the number of dwelling units permits [sic] that can reasonably be issued on an annual basis.

(2) After the public hearing, the Planning Board shall set the number of permits to be issued for the one year period following enactment of the limit, or such other shorter period as may be desirable. At the end of the year, or such other shorter period, the Planning Board shall hold a hearing to determine if the permit limitation should be removed or altered. After making findings of fact, the Planning Board may (a) extend the permit limitation, (b) alter the permit limitation, or (c) remove the permit limitation.

E. Phasing. The Planning Board, as part of its decision, may require phasing in accordance with the provisions of Article VI (Phasing).

F. Equitable Distribution: In order to insure equitable distribution of available permits, no individual, partnership, corporation, or other entity or its related or affiliated entities or, in the case of individuals, their relatives or persons associated in business, may receive more than 20% of the permits or six units, whichever is less, available during the limitation period.

* * *

APPENDIX L

PLANNING BOARD
TOWN OF FREMONT, NEW HAMPSHIRE

NOTICE OF DECISION

You are hereby notified that the Fremont Planning Board held a Public Hearing on April 14, 1999 and voted, pursuant to the Notice of Growth Impact, to impose the following restrictions on the issuance of building permits for the periods referenced.

GROWTH CONTROL AND PERMIT LIMITATIONS

1. The Planning Board establishes a category of building permits which shall be available to lot owners who do not have vested rights, but request building permits solely for the purposes of the construction of single family residential dwellings for the owner's principal residence. The number of these permits available for the year beginning April 14,1999 and ending April 13, 2000 shall be three (3). Any applicant for such a permit shall be limited to one permit, and the applicant shall execute an affidavit in the form prescribed by the Building Inspector which shall affirm that the permit and the construction thereunder is solely for the purposes of a single family residence for that applicant/lot owner.

2. For lot owners who do not fall under the above Paragraph I category, the Board hereby determines that the total number of building permits otherwise available in the year beginning April 14 1999 and ending April 13, 2000 shall be twenty six (26) permits.

3. In order to adequately recognize the rights and interests of property owners who may have vested rights and those

who may not have vested rights, but do not fall under the Paragraph I category, and to provide for an equitable allocation and distribution of building permits during the above period, and to prevent the procurement of permits not intended for reasonably immediate use, the rules regarding the issuance of permits under Paragraph 2 above are as follows:

A. Prior to June 15, 1999, property owners with vested rights only shall be entitled to make application for building permits regardless of whether the number of such permits shall exceed the limit recited under Paragraph 2 above. If, as of June 15, 1999 or anytime thereafter, the total number of permits issued shall not exceed the number listed under Paragraph 2 above, any property owner shall be entitled to make application for building permit on a first come first serve basis.

B. Any permit issued under Paragraph A above which shall not be acted upon thirty (30) days from the date of its issuance or if issued prior to the date hereof, then thirty (30) days from this date, shall lapse and for such lapse(s) shall be deemed to reduce the number of permits issued for the purposes of whether additional permits are available to be issued.

C. The Planning Board or the Board of Selectmen or their agent shall be authorized to advise and instruct the. Building Inspector as to whether any lot or property which shall be the subject of a building permit application shall be entitled to vest right status under Paragraph A above.

D. The building Inspector shall be entitled to determine whether the recipient of any building permit shall have acted on the permit within the time limitations under Paragraph B above. The Building Inspector shall consider the extent and degree of construction, site preparation or other factors evidencing actual intent to commence and complete construction under the building permit. If the building Inspector shall determine that the permit shall not have been acted upon and shall have lapsed he shall issue a notice of same to the holder of the permit and that permit shall be deemed of no further validity or effect.

Michael Tuscano, Chairman

APPENDIX M

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

February 12, 2003

Mr. Sumner F. Kalman
147 Main Street
P.O. Box 988
Plaistow, NH 03865

Re: Henry Torromeo and MDR Corporation v. Town of Fremont, New Hampshire Application No. 02A670

Dear Mr. Kalman:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on February 12, 2003, extended the time to and including April 14, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, Clerk

By

Jeffrey D. Atkins
Assistant Clerk